Decision 12-10-030 October 25, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of California-American Water Company (U210W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates.	Application 12-04-019 (Filed April 23, 2012)

DECISION DECLARING PREEMPTION OF COUNTY ORDINANCE AND THE EXERCISE OF PARAMOUNT JURISDICTION

1. Summary

This decision determines that the authority of the Commission in regard to this application preempts Monterey County Code of Ordinance, Title 10, Chapter 10.72, concerning the construction, operation and ownership of desalination plants. This decision further determines that the findings, conclusions and orders herein are an exercise of jurisdiction that is paramount to that of a county Superior Court concerning the same subject.

2. Background

2.1. The State Mandate Behind California-American Water Company (Cal-Am)'s Search for Replenishment Water

The Monterey District of the Cal-Am is served by scarce water resources[1] and has a continuing water supply deficit. Most of the Monterey District's current water demand is met by water diverted from the Carmel River without a water right.[2] Only graduated and deferred deadlines of compliance in water right orders have allowed current water demand in Cal-Am's Monterey District to be matched with physical water supplies. Under a 2009 Cease and Desist Order of the State Water Resources Control Board (SWRCB), Cal-Am will lose 70 percent of its present water supply from the Carmel River at the end of 2016. Failure to be on line with a replenishment water supply by that date could result in serious social, economic, environmental and public health consequences. The instant Application (A.) 12-04-019, proposing a Monterey Peninsula Water Supply Project (MPWSP) that would be complemented by groundwater

[1] The two sources are the Seaside Basin and the Carmel River.

[2] Cal-Am is under order from the SWRCB to cease diverting water to which it has no legal rights, determined in 1995 to be 10,730 acre feet of water per year from the Carmel River. Under the SWRCB's October 20, 2009 Cease and Desist Order, WR-2009-0060 (2009 CDO), an immediate reduction of five percent in Carmel River diversions was ordered (Condition 3), to be followed by annual cumulative reductions of 121 acre feet from 2011 to 2015 and a termination of all unlawful diversions by December 31, 2016 (Condition 3).

The utility must also replace 2,975 acre feet of water per year in allocations from the Seaside Basin. Under the February 9, 2007 Amended Decision at 17-22, in the Seaside Basin Adjudication, California-American Water Company v. City of Seaside, Case No. M66343, Superior Court of Monterey County, there is a declining schedule of aquifer pumping (operating yield) to regain safe yield (natural safe yield).

replenishment and aquifer storage and recovery supplies, is Cal-Am's effort to achieve a state-mandated shift away from large-scale dependence on the Carmel River.[3]

2.2. Monterey County Desalination Ordinance

In 1989, Monterey County adopted an ordinance, now codified as Title 10, Chapter 10.72 (Desal Ordinance), governing the issuance, suspension and revocation of permits for the construction and operation of desalination treatment facilities.[4] The Desal Ordinance is appended to this decision as Attachment A.

The Desal Ordinance requires that a permit be obtained from the County Director of Environmental Health (Director) before a building permit will issue.[5] Applicants for desal construction permits must give notice of an intent to construct; provide preliminary feasibility studies; show conformance with local land use zoning; and submit "specific detail engineering, construction plans and specifications;" submit a chemical analysis of the intake water, a study of groundwater extraction impacts, studies and plans for brine and other by-products disposal, and an alternative water supply contingency plan.[6] Before

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[3] It is noteworthy that behind the state cease and desist order there stands the federal government's Endangered Species Act mandate requiring protection of the steelhead population and its Carmel River habitat. *See* WR-2009-0060 (2009 CDO) at 39, citing 50 CFR 223.102 (enumeration of threatened marine and anadromous species) and 223.203 (anadromous fish). In sum, both state and federal levels of authority are ever-present in the Monterey Peninsula in regards to the pursuit of replenishment water.

[4] Ordinance 3439.

[5] § 10.72.010 (permits required).

[6] § 10.72.020 (A)-(F) (construction permit application process).

a desal construction permit can issue the Director is to acquire evidence from the County Flood Control and Water Conservation District that there will be no "detrimental impact upon the water quantity or quality of existing groundwater resources."[7]

> Applicants for an operation permit are to show:
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> …proof of financial capability and commitment to the operation, continuing maintenance, replacement, repairs, periodic noise studies and sound analyses, and emergency contingencies…[8]

and, significantly for our decision here,

> …[p]rovide assurances that each facility will be owned and operated by a public entity.[9]

The applicant is to provide a monitoring and testing program as well as a maintenance and operating plan.[10] Once the applicant becomes an operator of a desal facility, it is required to timely report changes of various kinds, including ownership or control;[11] and to submit, prior to start up, to an onsite inspection by the Director, who has an ongoing right of "reasonable inspection."[12]

The Desal Ordinance further requires testing for "reliability and efficacy" and, if the results are positive, the obtaining of another permit, a water system

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[7] § 10.72.020 (G).

[8] § 10.72.030 (A).

[9] § 10.72.030 (B).

[10] § 10.72.030 (C) and (D).

[11] § 10.72.030 (E).

[12] § 10.72.040 (A) and (B).

permit, from the Director before operations begin.[13] The next set of provisions in sequence pertain to the display, revocation and suspension of the construction and operation permits, as well as an appeal procedure covering instances of application denial and permit suspension or revocation.[14] Provisions concerning the payment of fees and the imposition of civil penalties close out Chapter 10.72.[15]

2.3. Current Controversy Concerning Preemption

Five days before Cal-Am filed its April 23, 2012 Application in this proceeding, the Commission's General Counsel, Frank R. Lindh, sent a letter to the Monterey County Counsel, Charles J. McKee on the subject of the Desal Ordinance.[16] Concerning § 10.72.030(B) ("[p]rovide assurances that each facility will be owned and operated by a public entity"), Lindh stated, in part,

> It is our view that, to the extent this ordinance purports to limit sponsorship of a desalination project only to governmentally-owned enterprises, and more particularly to prohibit such sponsorship by a private, for-profit, investor-owned utility company regulated by our Commission—such as CalAm—the ordinance would be preempted and of no legal validity under settled principles of California law.[17]

Lindh further noted that in April of 2003 the then Acting Monterey County Counsel expressed the opinion that "the County might be preempted from using

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[13] § 10.72.050 (A) and (B).

[14] § 10.72.070 and § 10.72.080. The appeal is to the Director, whose decision is final.

[15] § 10.72.090 and § 10.72.100.

[16] The letter can be accessed at: Monterey County Counsel Letter.pdf

[17] April 18, 2012 Letter from Frank R. Lindh to Charles J. McKee at 1.

a 'public entity' requirement to deny Cal-Am a permit to operate [a desalination] facility."[18]

Although Lindh's letter was represented to be "[o]n behalf of the Public Utilities Commission," up until the instant decision the legal conclusion that the public ownership requirement of the Desal Ordinance is preempted has not been adopted by formal action of the Commission. The assigned Administrative Law Judge (ALJ) for this proceeding has determined that the preemption issue is a threshold issue that the parties should have an opportunity to brief and that it should be resolved in an early Commission decision. The ALJ issued a Ruling on June 1, 2012 inviting briefs from the parties on the subject, as well as certain water rights issues, and the last round of briefing ended on July 25, 2012. Briefs on the issue were submitted by Cal-Am, Marina Coast, Division of Ratepayer Advocates (DRA), Waterplus, County of Monterey and Monterey County Water Resources Agency, Monterey Peninsula Water Management District (MPWMD), Monterey County Farm Bureau, Landwatch Monterey County, and Salinas Valley Water Coalition. DRA, and Cal-Am (supported by the MPWMD) argued that the Desal Ordinance is preempted by the Commission for purposes of the instant Application. Marina Coast and Salinas Valley Water Coalition argued that the Desal Ordinance is not preempted and Waterplus argued that Cal-Am had not met its burden of proof on the subject.[19]

On June 26, 2012, during the briefing period just mentioned, the County of Monterey filed a declaratory relief suit against Cal-Am in the Superior Court of

[18] *Ibid.* at 2.

[19] The other parties briefing the issue took more equivocal or nuanced positions.

County of San Francisco,[20] Case No. CGC-12-521875, seeking a decision that the Desal Ordinance is not preempted in regard to Cal-Am's Application in this proceeding.

The same preemption issue, then, is now pending before us and before the Superior Court of the County of San Francisco. We conclude in the discussion section below that the Commission's authority in connection with this proceeding, A.12-04-019, preempts the Monterey County Desal Ordinance; that the Commission has paramount jurisdiction relative to the Superior Court that is presiding over Case No. CGC-12-521875; and that, accordingly, under § 1759 of the Pub. Util. Code, the Superior Court has no "jurisdiction to review, reverse, correct, or annul" the instant decision or "to suspend or delay the execution or operation" of this decision.

3. Discussion

As a preliminary matter, we note that the California Supreme Court has stated:

> The commission is a state agency of constitutional origin with far-reaching duties, functions and powers. (Cal. Const., art. XII, § 1-6.) The Constitution confers broad authority on the commission to regulate utilities, including the power to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures. (*Id.*, §§ 2, 4, 6.) The commission's powers, however, are not restricted to those expressly mentioned in the Constitution: 'The Legislature has *plenary power, unlimited by the other provisions of this constitution* but consistent with this article, to confer additional authority and jurisdiction upon the commission . . . .' (Cal. Const., art.

[20] County of Monterey vs. California-American Water Company, Case No. CGC-12-521875, Complaint for Declaratory Relief.

> XII, § 5.) (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905 [160 Cal.Rptr. 124, 603 P.2d 41], italics added.)
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> Pursuant to this constitutional provision the Legislature enacted, inter alia, the Public Utilities Act. (§ 201 et seq.) That law vests the commission with broad authority to "supervise and regulate every public utility in the State" (§ 701) and grants the commission numerous specific powers for the purpose. Again, however, the commission's powers are not limited to those expressly conferred on it: the Legislature further authorized the commission to "*do all things*, whether specifically designated in [the Public Utilities Act] *or in addition thereto*, which are necessary and convenient" in the exercise of its jurisdiction over public utilities. (*Ibid.*, italics added.) Accordingly, "The commission's authority has been liberally construed" (*Consumers Lobby Against Monopolies v. Public Utilities Com., supra,* 25 Cal.3d 891, 905, citing cases), and includes not only administrative but also legislative and judicial powers (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 630 [268 P.2d 723]). (San Diego Gas and Electric Company v. Superior Court of Orange County, 13 Cal.4th 893 at 914-915 (1996) ("Covalt")).

In short, the Commission has very broad and far-reaching authority over the operations and facilities of public utilities under its jurisdiction, including Cal-Am.

The authority of local governments in this area is expressly limited. The California Constitution states that local governments, such as cities and counties, may not regulate matters over which the Legislature grants regulatory power to the Commission. (*See*, California Constitution, Article XII, Section 8, cited in DRA Opening Brief at 5 and Cal-Am Opening Brief at 2.)

The general concept of state preemption of local ordinances is described by Cal-Am:

> Local legislation in conflict with general law is void under the California Constitution. [fn. omitted.] A local ordinance conflicts with general law if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. [fn omitted.] If the subject matter or field of the legislation has been fully occupied by the State, there is no room for supplementary or complementary local legislation, even if the subject is otherwise an appropriate area of local concern. [fn omitted.] If local legislation conflicts with general law or is a matter of statewide rather than strictly local concern, the local ordinance is void, whether or not the general law completely occupies the field, however defined. (Cal-Am Opening Brief at 2, citing Cal. Const. Article XI, Section 7, and *California Water & Telephone Company v. County of Los Angeles* (1967) 253 Cal.App.2d 16 at 18.)

Here we determine that Monterey County Ordinance Chapter 10.72 (Desal Ordinance) is in conflict with California law, and it is preempted in its entirety.[21] The Desal Ordinance attempts to regulate a specific subject matter – the siting, construction, operation and ownership of a facility proposed to be constructed by a water utility subject to the Commission's jurisdiction – that has been fully occupied by the state. The Desal Ordinance also directly contradicts an express determination of this Commission.

As described above, local authority over Commission-regulated utilities is essentially interstitial: local agencies, such as Counties, may regulate those matters otherwise within their authority that do not conflict with general laws

[21] The June 1, 2012 ALJ Ruling at 3 requested briefing on the Desal Ordinance in general ("… brief the issue of the applicability of the ordinance to the proposed Monterey Peninsula Water Supply Project, and the extent, if any, to which the Commission's authority preempts that ordinance in part or whole"); it was not limited

Footnote continued on next page

or matters of statewide concern. (*See*, e.g. Marina Coast Opening Brief at 1-2, Cal-Am Opening Brief at 2.) The Desal Ordinance is in conflict with general laws on a matter of statewide concern that has been addressed by the legislature and by this Commission. Not only does the relevant case law cited by the parties indicate that the Desal Ordinance is preempted, a prior decision of this Commission (and a resulting General Order (GO)) expressly states that local ordinances, such as the Desal Ordinance, are preempted.

Commission GO 103-A, approved by the Commission in Decision (D.) 09-09-004, applies to Cal-Am. The Commission stated:

> General Order 103 sets forth the Commission's rules governing water and sewer service and the minimum standards for design and construction of the systems. It applies to all water and wastewater utilities [fn. omitted] operating under the jurisdiction of the Commission. (D.09-09-004 at 2, emphasis added.)

The GO itself states:

> The purpose of these rules is to establish minimum standards to be followed in the design, construction, location, maintenance and operation of the facilities of water and wastewater utilities operating under the jurisdiction of the Commission. Each of these rules is subject to active oversight and enforcement by the Commission. (GO 103-A, Section I.1.A.)

No party has contested the applicability of GO 103-A to Cal-Am or Cal-Am facilities. DRA points out that GO 103-A contains the following language, under the heading "Preemption of Local Authority":

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to a specific section, and no party made an argument for severability or partial preemption.

> Local agencies acting pursuant to local authority are preempted from regulating water production, storage, treatment, transmission, distribution, or other facilities (including the location of such facilities) constructed or installed by water or wastewater utilities subject to the Commission's jurisdiction. However, in locating such projects, the utility should consult with local agencies regarding land use matters. (GO 103-A, Section I.9; *see* also DRA Reply Brief at 2-4.)

From this language, DRA correctly concludes that "[L]ocal agencies acting pursuant to local authority are expressly preempted from regulating water utility facilities, such as water production and water treatment plants." (DRA Reply Brief at 3.)

DRA goes on, and explains how the Monterey Ordinance is a local attempt to regulate water facilities that are under the jurisdiction of the Commission:

> Section 1, subdivision 9 of GO 103-A applies to and preempts the Monterey Ordinance. The Monterey Ordinance was adopted pursuant to local authority, i.e., by the Board of Supervisors of Monterey County; no state or federal legislation required its enactment. Further, the Monterey Ordinance purports to regulate all "Desalination Treatment Facilities" proposed in Monterey County – facilities that treat water by removing salts and thereby produce water for domestic use and irrigation purposes – including desalination plants proposed by water utilities.
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> This is the same subject matter which GO 103-A declares to be under the exclusive regulatory purview of the Commission, i.e., the regulation of water treatment and water production facilities constructed by water utilities. Moreover, the Monterey Ordinance also purports to regulate the location of desalination plants constructed by water utilities, insofar as it prohibits the siting of such privately owned facilities in Monterey County. Pursuant to the Monterey Ordinance an investor-owned water utility would be unable to obtain a

> permit to operate, and therefore construct, a desalination plant in Monterey County unless it were to provide "assurances" that it would transfer ownership and operation of the facility to a public entity. Accordingly, the Monterey Ordinance must fall before the Commission's "preemptive regulatory authority," as expressly declared in Section 1, subdivision 9 of G.O. 103-A, and thus, its requirements are void and unenforceable as applied to investor-owned water utilities regulated by the Commission. (DRA Reply Brief at 3-4, footnotes omitted.)

DRA is correct. This Commission, in GO 103-A and D.09-09-004, has expressly preempted the Desal Ordinance.

Separate and apart from GO 103-A, California case law confirms that the Desal Ordinance is preempted. In their briefing on the topic of preemption, the parties cite to numerous California cases. Marina Coast provided a useful summary of a number of them:

> The Commission is a statewide agency with broad statutory and constitutional powers. [Leslie v. Superior Court (1999) 73 Cal.App.4th 1042, at 1047, citing San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal.4th 893, at 914, 915 ("Covalt")]. Where a purely local law or regulation directly interferes with the Commission's statewide regulation of public utilities, the local law is clearly preempted. [San Diego Gas & Electric Co. v. City of Carlsbad (1998) 64 Cal.App.4th 785, at 802-803 ("Carlsbad") (dredging, which had been ongoing at the site for over forty years, was essential to an electric company's continuing ability to operate and maintain its existing power plant facility and was incompatible with a recent local ordinance regulating floodplain dredging, therefore the local ordinance was preempted under the Commission's statewide regulatory authority); Southern Cal. Gas Co. v. City of Vernon (1995) 41 Cal.App.4th 209, 217 (local ordinance preempted by statewide Commission authority to regulate gas transmission pipelines); Harbor Carriers, Inc. v. City of Sausalito (1975)

> 46 Cal.App.3d 773, 775-76 [involving CPCN and partially invalid city zoning ordinance]; [California Water & Tel. Co. v. County of Los Angeles (1967) 253 Cal.App.2d 16, at 31] (because the Commission has a statewide interest in regulating water utilities and has promulgated specific rules, including for design and construction of water delivery systems, a county ordinance requiring county review and approval of the details of water delivery system design, construction and operation was preempted).
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> However, if the law in question does not conflict with statewide authority, it must be upheld. [Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal.4th 1139, at 1161-62 [legislature did not intend to preempt local zoning authority over timber operations]. An ordinance that is not purely local in nature should also be upheld where there is no conflict. (Leslie v. Superior Court, supra, 73 Cal.App.4th at 1052-53 (upholding county grading requirements against a regulated utility, based on mandatory statewide application of the Uniform Building Code and the California Building Standards Code, from which the county regulations largely derived, and based on the absence of Commission regulations governing access road grading).

Marina Coast Opening Brief at 4-5.

Almost all of these cases, when applied to the facts before the Commission in this proceeding, confirm the conclusion that the Commission can preempt the Desal Ordinance. Of the cases cited by the parties, however, the most directly on point appears to be the California Water & Telephone case, described by Cal-Am as follows:

> In California Water & Telephone Co. v. County of Los Angeles (1967) 253 Cal.App.2d 16 (California Water & Telephone), the court struck down as unconstitutional a county ordinance that required any person that supplied domestic water to more than one customer to obtain a permit as a condition precedent to the construction of any portion of the water system. The

> purported purpose of the ordinance was to promote fire safety, an area otherwise within a municipality's authority over health and safety. Nevertheless, the court found that "the construction, design, operation and maintenance of public water utilities is a matter of state-wide concern." The court reasoned that the control of design and construction of water utility facilities "is not a municipal affair subject to a checkerboard of regulations by local governments" and is within the exclusive statewide jurisdiction of the Commission.

Cal-Am Opening Brief at 5, footnotes omitted.

DRA concurs with Cal-Am, arguing that the California Water & Telephone case is "of particular relevance here." DRA Opening Brief at 8. Marina Coast concedes that under the California Water & Telephone case that: "…the Commission has a statewide interest in regulating water utilities…" (Marina Coast Opening Brief at 4.) Marina Coast attempts to distinguish the case by arguing that: 1) there is no specific provision of the Pub. Util. Code that extends the Commission's express authority over public utilities' sale and delivery of water to include regulation of the source of that water; (Marina Coast Opening Brief at 5, emphasis in original), and that 2) desalination is an issue of statewide concern, not a purely local issue (*Id*. at 6-7). These arguments are not supported by the law or the record in this proceeding.

Marina Coast acknowledges that the Commission has comprehensive authority over regulated utilities' "sale and distribution" of water (Opening Brief at 6), but tries to distinguish the present situation by arguing that nothing in the Pub. Util. Code extends that authority to the source of the water that the utility distributes and sells. (*Id.* at 5, emphasis in original; Marina Coast Reply Brief at 1-2.)

First, Marina Coast's attempt to limit the Commission's authority over Cal-Am to its "sale and distribution" of water is far too narrow. As Cal-Am

correctly points out, the Commission is authorized to regulate all aspects of utility facilities and infrastructure. (Cal-Am Opening Brief at 3, citing Pub. Util. Code §§ 1001, 762, and 768.) DRA similarly points out that Pub. Util. Code § 1001 requires that utilities obtain Commission authorization prior to constructing any "line, plant, or system, or of any extensions thereof." (DRA Opening Brief at 3.)

In addition, Marina Coast assumes that the desalination plant is a "water source," and based on that assumption, Marina Coast argues that the desalination plant falls outside of the Commission's purview. (Marina Coast Reply Brief at 1-2.) Marina Coast's assumption is incorrect. While the proposed desalination plant may produce fresh water, it is not the source or supply of water – the source of water would be the ocean (or possibly groundwater). Treatment of surface water or groundwater does not make the treatment plant the "source" of that water. Likewise here, treatment of seawater (including desalination) does not make the treatment plant the source of the water.

Marina Coast's claim is also inconsistent with the Desal Ordinance itself, which refers to a "Desalinization Treatment Facility," defined as a "facility which removes or reduces salts from water to a level that meets drinking water standards and/or irrigation purposes…" (Desal Ordinance § 10.72.010.)

While arguing that the desalination plant is a "water source," Marina Coast later argues that the "source water" is the water that is goes into the desalination facility:

> Since Cal-Am has no groundwater rights in the SVGB [Salinas Valley Groundwater Basin], sufficient rights must be obtained to permit extraction of the volume of groundwater that is contained within the brackish source water. Without test well results, it is unclear precisely what percentage of source water will constitute groundwater, but Cal-Am's application plainly

> states…that the brackish source water will contain some percentage of SVGB groundwater. (Marina Coast Opening Brief at 12-13.)

Marina Coast is arguing that the Commission has no jurisdiction of the desalination plant because it is a "water source," while simultaneously arguing that Cal-Am cannot take water from the SVGB because that basin contains the "source water." Marina Coast cannot have it both ways, that the water is coming from the desalination plant (for one legal argument) and from the groundwater basin (for another legal argument). The Desal Ordinance and GO 103-A confirm that the desalination plant at issue here is a facility within the Commission's jurisdiction, not a "water source."

The second question is whether the Desal Ordinance is a purely local law or regulation. Marina Coast concedes that: "Where a purely local law or regulation directly interferes with the Commission's statewide regulation of public utilities, the local law is clearly preempted." (Marina Coast Opening Brief at 4, citing Carlsbad.)

In Leslie, it was found that local grading regulations were adopted due to the mandatory local application and implementation of statewide [building codes], and accordingly the grading regulations, despite being adopted by local ordinance, were not purely local, 73 Cal.App.4th at 1052-1053. Here, there is no state law or regulation that required or directed Monterey County to adopt the Ordinance at issue. (*See*, DRA Reply Brief at 9.) In fact, Marina Coast concedes that desalination plant regulation "…is not yet the subject of any final rules or regulations promulgated by a statewide agency." (Marina Coast Opening Brief at 7.) The Desal Ordinance is a purely local law or regulation and, consistent with Leslie and other California case law, is subject to preemption by this Commission.

Monterey County and the Monterey County Water Resources Agency argue that the Commission's authority to preempt the Desal Ordinance is "uncertain," and that the Commission lacks authority to determine the enforceability or validity of the Desal Ordinance. (County and Water Resources Agency Opening Brief at 1-2.) The County and Water Resources Agency are mistaken, as the Commission has preempted the Desal Ordinance in GO 103-A and D.09-09-004, and clearly has the authority to preempt the Desal Ordinance under California case law. (*See*, e.g., Cal Water & Telephone, supra.)

The County and Water Resources Agency cite to a provision of the California Constitution that states that an administrative agency such as the CPUC has no power to declare a statute unenforceable or unconstitutional. (*Id.*, citing California Constitution, Article III, Section 3.5.) It is correct that the CPUC cannot on its own declare a state statute unenforceable or unconstitutional, just as it cannot preempt state-level regulations. (*See* Leslie, *supra*.) Here, however, the Commission is not finding a state statute unenforceable or unconstitutional, but rather is preempting a purely local county ordinance. The Commission has that authority.

The County and Water Resources Agency argues that the Commission should wait for the outcome of (and defer to) the County's pending declaratory relief action in San Francisco Superior Court on this same issue, on the grounds that a judicial resolution will provide for "certainty and efficiency." (*Id.* at 1-2.)

The Commission does not need to wait for the Superior Court to act on the County's declaratory relief action. Under § 1759 of the Pub. Util. Code, the

Superior Court has no "jurisdiction to review, reverse, correct, or annul" the instant decision or "to suspend or delay the execution or operation" of it. [22]

The Commission has already acted within its authority to preempt the Desal Ordinance, both in GO 103-A and today. There is no certainty or efficiency to be gained by waiting for the Superior Court to act.

Marina Coast argues that neither the Commission nor the Superior Court can act to preempt the Desal Ordinance until such time as the Commission makes a determination that the Cal-Am project is necessary. (Marina Coast Opening Brief at 11-12, Reply Brief at 4.) Typically, such a determination would be made in a Commission decision approving Cal-Am's project, and granting them authority to build it and recover the costs in rates. In other words, Marina Coast is arguing that before the Commission can find that it preempts the local

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[22] DRA correctly argues (DRA Reply Brief at 10, footnote excluded):

> Monterey County cannot circumvent the Commission's proper exercise of its jurisdiction over investor-owned public utilities with a preemptive lawsuit in superior court for adjudication of an issue that is currently being determined by the Commission in the instant proceeding.
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> As repeatedly explained by the California Supreme Court, the "[Commission] has exclusive jurisdiction over the regulation and control of utilities, and once is has assumed jurisdiction, it cannot be hampered, interfered with, or second-guessed by a concurrent superior court action addressing the same issue." *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 275 (quoting *San Diego Gas & Electric Co. v. Superior Court* ("*Covalt*") (1996) 13 Cal.4th 893, 918, fn.20) (internal quotation omitted). The Legislature has vested the California Supreme Court and the California Court of Appeal with exclusive jurisdiction to review Commission actions. Pub. Util. Code § 1759.

ordinance, the Commission (and all the parties) should go through the entire Commission litigation process, including evidentiary hearings and briefing, the Commission should perform a complete California Environmental Quality Act review of the project, and the Commission must issue a final decision approving the project.

This argument makes no sense from a legal, procedural or common sense perspective. There is a legitimate application before this Commission from a utility subject to the Commission's jurisdiction, and there is an open proceeding to consider that application. It is reasonable for the Commission to determine up front, as a threshold issue, whether it has the legal authority to grant the approval sought by the utility. There is an actual conflict between Cal-Am's Application and the Desal Ordinance. It is clear that in the pending application proceeding, the Commission could authorize or order Cal-Am to construct a desalination plant in Monterey County. If the Commission were to do so, the Desal Ordinance would be in direct conflict.

Marina Coast is correct that if the Commission does not approve the project, then there would be no actual conflict with the Desal Ordinance. But it does not follow that, just because the Commission may not approve Cal-Am's application, the Commission should defer its finding on preemption. Under that logic, a criminal court would defer its finding of jurisdiction until after a verdict is reached because of the possibility that the defendant may be acquitted. The Commission can determine the scope of its own authority, and can manage its own proceedings, and has broad authority to do so. (*See*, Pub. Util. Code § 701.) Considerations of certainty, efficiency, and fairness to all parties indicate that the Commission should make its determination of preemption now, rather than later.

A number of parties make policy arguments as to why public ownership of a desalination facility is preferable to private ownership by Cal-Am. (*See*, e.g., Briefs of Salinas Valley Water Coalition, Public Trust Alliance, and Citizens for Public Water.) We do not address those larger policy questions, such as the relative benefits of public versus private ownership, in this decision.

We have an application by Cal-Am before us that we need to address, and we generally do not have jurisdiction over public agencies. The scope of our decision today is correspondingly limited, and does not foreclose any public agency from developing a water supply solution for the Monterey Peninsula.[23] Our determination that the Desal Ordinance is preempted means that this Commission could approve the proposed Cal-Am project, but it does not in any way pre-judge whether this Commission will approve the proposed project.

4. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code, and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Seven of the 19 Parties in this proceeding commented. Opening comments were received from the County of Monterey and the Monterey County Water Resources Agency (MCWRA), Marina Coast Water District (MCWD) and Water

[23] We note that there can be benefits from public participation in projects of this kind, regardless of the ownership structure of the facility. Cal-Am has been directed to consider seriously and "in good faith any public agency proposal for direct participation in the [MPWSP] that is feasible and sufficiently developed to allow implementation in a timely manner and that is made by October 1, 2012." ALJ Ruling of August 29, 2012, at 16.

Plus.[24] Reply comments were received from Cal-Am, MCWD, Public Trust Alliance and Citizens for Public Water.[25]

Monterey County comments that it is working with Cal-Am towards a resolution of the parallel *County of Monterey v. California-American Water* Company suit[26] "in a fashion that would strike an appropriate balance between the Commission's jurisdiction and the County's interest in certain exclusively local matters."[27] The County does not appear to propose or request any specific changes to the proposed decision.

[24] Response of Water Plus (dated October 10, 2012), Comments of County of Monterey and MCWRA (October 11, 2012), and MCWD's Comments (October 11, 2012).

[25] Citizens for Public Water's Reply Comments (October 15, 2012), Comments of Cal-Am (October 16, 2012), MCWD's Reply (October 16, 2012), and Public Trust Alliance's Joinder in MCWD's Comments (October 16, 2012).

[26] San Francisco County Superior Court, Case No. CGC-12-521875.

[27] Comments of County of Monterey at 1.

MCWD concedes that the Commission can preempt the Desal Ordinance, but argues that the Proposed Decision is premature, on the grounds that the Commission cannot exercise its acknowledged authority to preempt the Desal Ordinance until it actually approves the proposed Cal-Am project by issuing a Certificate of Public Necessity and Convenience (CPCN).[28] We disagree. As made clear in Section 3 of this Proposed Decision, three forms of preemption operate here: express preemption, field preemption, and conflict preemption. The express form of preemption alone, as reflected in GO 103-A and D.09-09-004, is dispositive, as it is ever present and does not require the issuance of a CPCN in this proceeding for its efficacy.

To postpone a resolution of a threshold jurisdictional issue like preemption until the end of the lengthy and expensive CPCN application process would not be efficient, fair to the parties, or in the public interest. The Commission has the authority to manage its own proceedings, and is not required to delay making a finding of its own authority until after it exercises that authority. (*See*, Cal-Am Reply Comments at 3-4.)

[28] "The Commission cannot lawfully preempt the Ordinance and find a conflict between its regulation and the prohibition contained in the Ordinance unless and until it approves a project and violates the Ordinance." MCWD's Comments, at 1; supported in Citizens for Public Water's Reply Comments, at unnumbered 1-2. MCWD also argues that the pending and parallel declaratory relief suit in the San Francisco County Superior Court is neither ripe nor an actual controversy, that it interferes with the Commission's exercise of its authority and that the suit should be dismissed. MCWD's Reply at 1- 2.

Similarly, there is no legal or practical basis for deferring resolution of this threshold legal issue to some point after there is a determination of possible public agency participation in Cal-Am's project, as urged by Citizens for Public Water.[29] Public agency participation remains welcomed, but is not required by law.

No modifications have been made in the Proposed Decision.

5. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Gary Weatherford is the assigned ALJ in this proceeding.

Findings of Fact

1. Under the SWRCB's October 20, 2009 Cease and Desist Order, WR-2009-0060, Cal-Am will lose 70 percent of its present water supply from the Carmel River at the end of 2016. Failure to be on line with a replenishment water supply by that date could result in serious social, economic, environmental, and public health consequences.

2. The instant A.12-04-019 (filed April 23, 2012), proposing a MPWSP anchored by a desalination facility and complemented by groundwater replenishment and aquifer storage and recovery supplies, is Cal-Am's effort to achieve a state-mandated shift away from large-scale dependence on the Carmel River.

3. In 1989, Monterey County adopted an ordinance (desalination ordinance), now codified as Title 10, Chapter 10.72, governing the issuance, suspension and revocation of permits for the construction and operation of desalination

[29] *See* Citizens for Public Water's Reply Comments at unnumbered 3-4.

treatment facilities. Applicants for an operation permit, among other things, are to "[p]rovide assurances that each facility will be owned and operated by a public entity."

4. GO 103-A sets forth the Commission's rules governing water and sewer service and the minimum standards for design and construction of the systems.

5. On June 26, 2012, the County of Monterey filed a suit in the Superior Court of the County of San Francisco entitled *County of Monterey vs. California-American Water Company*, Case No. CGC-12-521875, which seeks the relief of a declaration that the Desalination Ordinance is not preempted by Commission authority regarding the MPWSP proposed in A.12-04-019.

Conclusions of Law

1. The Commission should declare that its authority, exercised through GO 103-A in A.12-04-019, preempts the Monterey County Desalination Ordinance, Title 10, Chapter 10.72, which purports to govern the issuance, suspension and revocation of permits for the construction and operation of desalination treatment facilities.

2. Under § 1759 of the Pub. Util. Code, the Superior Court of San Francisco County in *County of Monterey vs. California-American Water Company*, Case No. CGC-12-521875, has no "jurisdiction to review, reverse, correct, or annul" the instant decision of the Commission or "to suspend or delay the execution or operation" of it.

3. The Commission should not delay the instant proceeding to await developments in or the outcome of *County of Monterey vs. California-American Water Company*, Case No. CGC-12-521875, pending in the Superior Court of San Francisco County.

4. The Commission should direct Cal-Am to seek expeditiously a dismissal, summary judgment or other favorable outcome in *County of Monterey vs. California-American Water Company*, Case No. CGC-12-521875, in the Superior Court of San Francisco County, on the ground that applicable law requires a determination that the Commission's authority preempts the Monterey County Desalination Ordinance regarding A.12-04-019.

5. Today's decision should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. The Commission's authority, exercised through General Order 103-A in Application 12-04-019, preempts the Monterey County Desalination Ordinance, Title 10, Chapter 10.72.

2. Under § 1759 of the Pub. Util. Code, the Superior Court of San Francisco County in *County of Monterey vs. California-American Water Company*, Case No. CGC-12-521875, has no "jurisdiction to review, reverse, correct, or annul" the instant decision of the Commission or "to suspend or delay the execution or operation" of it.

3. The Commission shall not delay the instant proceeding to await developments in or the outcome of *County of Monterey vs. California-American Water Company*, Case No. CGC-12-521875, pending in the Superior Court of San Francisco County.

4. California-American Water Company is directed to seek expeditiously a dismissal, summary judgment or other favorable disposition in *County of Monterey vs. California-American Water Company*, Case No. CGC-12-521875, pending before the Superior Court of San Francisco County, on the ground that

applicable law requires a determination that the Commission's authority regarding Application 12-04-019 preempts the Monterey County Desalination Ordinance.

5. Preemption of Monterey County Desalination Ordinance, Title 10, Chapter 10.72 by Commission authority shall not prevent the Commission or California-American Water Company from taking into account related concerns and interests of the County of Monterey and from cooperating with the County of Monterey in regards to the Monterey Peninsula Water Supply Project proposed in Application 12-04-019.
6. Application 12-04-019 remains open.

This order is effective today.

Dated October 25, 2012, at Irvine, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
Commissioners

ATTACHMENT A

MONTEREY COUNTY CODE OF ORDINANCES

ATTACHMENT A

MONTEREY COUNTY CODE OF ORDINANCES

Chapter 10.72 - DESALINIZATION TREATMENT FACILITY

10.72.010 - Permits required.

No person, firm, water utility, association, corporation, organization, or partnership, or any city, county, district, or any department or agency of the State shall commence construction of or operate any Desalinization Treatment Facility (which is defined as a facility which removes or reduces salts from water to a level that meets drinking water standards and/or irrigation purposes) without first securing a permit to construct and a permit to operate said facility. Such permits shall be obtained from the Director of Environmental Health of the County of Monterey, or his or her designee, prior to securing any building permit.

(Ord. 3439, 1989)

10.72.020 - Construction permit application process.

All applicants for construction permits required by Section 10.72.010 shall:

A. Notify in writing the Director of Environmental Health or his or her designee, of intent to construct a desalinization treatment facility.

B. Submit in a form and manner as prescribed by the Director of Environmental Health, preliminary feasibility studies, evidence that the proposed facility is to be located within the appropriate land use designation as determined by the affected local jurisdiction, and specific detail engineering, construction plans and specifications of the proposed facility.

C. Submit a complete chemical analysis of the sea water at the site of proposed intake. Such chemical analysis shall meet the standards as set forth in the current ocean plan as administered by the California State Water Resources Control Board and the United States Environmental Protection Agency. In the event the proposed intake is groundwater (wells), a chemical analysis of the groundwater at the proposed intake site shall be submitted as prescribed by the Director of Environmental Health.

D. Submit to the Director of Environmental Health and Monterey County Flood Control and Water Conservation District a study on potential site impacts which could be caused by groundwater extraction.

E. Submit preliminary feasibility studies and detailed plans for disposal of brine and other by-products resultant from operation of the proposed facility.

F. Submit a contingency plan for alternative water supply which provides a reliable source of water assuming normal operations, and emergency shut down operations. Said contingency plan shall also set forth a cross connection control program. Applications which propose development of facilities to provide regional drought reserve shall be exempt from this contingency plan requirement, but shall set forth a cross connection control program.

G.

Prior to issuance of any construction permit, the Director of Environmental Health shall obtain evidence from the Monterey County Flood Control and Water Conservation District that the proposed desalinization treatment facility will not have a detrimental impact upon the water quantity or quality of existing groundwater resources.

(Ord. 3439, 1989)

10.72.030 - Operation permit process.

All applicants for an operation permit as required by Section 10.72.010 shall:

A.

Provide proof of financial capability and commitment to the operation, continuing maintenance replacement, repairs, periodic noise studies and sound analyses, and emergency contingencies of said facility. Such proof shall be in the form approved by County Counsel, such as a bond, a letter of credit, or other suitable security including stream of income. For regional desalinization projects undertaken by any public agency, such proof shall be consistent with financial market requirements for similar capital projects.

B.

Provide assurances that each facility will be owned and operated by a public entity.

C.

Provide a detailed monitoring and testing program in a manner and form as prescribed by the Director of Environmental Health.

D.

Submit a maintenance and operating plan in a form and matter prescribed by the Director of Environmental Health.

E.

All operators of a desalinization treatment plant shall notify the Director of Environmental Health of any change in capacity, number of connections, type or purpose of use, change in technology, change in reliance upon existing potable water systems or sources, or change in ownership or transfer of control of the facility not less than ten (10) days prior to said transfer.

(Ord. 3439, 1989)

10.72.040 - Inspection.

A.

Prior to operation of any desalinization treatment facility, operator shall submit to an on-site inspection of said facility by the Director of Environmental Health.

B.

The Director of Environmental Health shall have a continuing right to reasonable inspection of any desalinization treatment facility.

(Ord. 3439, 1989)

10.72.050 - Testing.

A.

Prior to operation, all desalinization treatment facilities shall be tested for reliability and efficacy for a period and in a form and manner as prescribed by the Director of Environmental Health.

B.

In the event that testing prescribed by Section 10.72.050A proves satisfactory, and notwithstanding any other permits required by this Chapter, applicant shall obtain a water system permit from the Director of Environmental Health prior to commencing operation.

(Ord. 3439, 1989)

10.72.060 - Permit—Display—Surrender.

A.

All permits issued pursuant to this Chapter shall be kept posted by the permittee in a conspicuous place in the permittee's place of business.

B.

If any such permit is suspended or revoked, it shall be surrendered to the Director of Environmental Health upon his or her demand.

(Ord. 3439, 1989)

10.72.070 - Permit—Revocation and suspension.

Upon proof to his or her satisfaction of the violation by the permittee of any of the relevant sanitation and health laws or regulations of the State of California or the County of Monterey, the Director of Environmental Health may temporarily suspend or may revoke either the construction or operation permit. No person whose permit has been suspended or revoked shall continue to engage in or carry on the business for which the permit was granted, unless and until, in the case of suspension, such permit has been reinstated by the Director of Environmental Health.

Any unreasonable denial of a request to inspect pursuant to Section 10.72.040 above shall result in revocation of the facility operating permit.

(Ord. 3439, 1989)

10.72.080 - Hearing procedure.

A.

Any person whose application for a permit has been denied, or whose permit has been suspended or revoked, may appeal to the Director of Environmental Health, in writing, within thirty (30) days after any such denial, or within three days after notification of any such suspension or revocation. The Director of Environmental Health shall set a time for such meeting, and make a decision without unnecessary delay.

B.

The filing of the written appeal shall operate as a stay of such suspension or revocation until final disposition of the appeal by the Director of Environmental Health.

(Ord. 3439, 1989)

10.72.090 - Fees.

Prior to issuance of any construction or operation permit, applicant shall pay to the County Health Department fees as set forth in Section 10.08.050 of the Monterey County Code.

(Ord. 3439, 1989)

10.72.100 - Civil penalties.

In addition to such penalties, punishments, or remedies provided in Chapter 1.20 of this Code, any person who violates any of the provisions of this Chapter shall be liable to the County for civil penalties in the amount of five thousand dollars ($5,000.00) per day the violation occurs or is allowed to exist, or in such other amount as the Board of Supervisors may establish by resolution.

(Ord. 3659 § 10, 1993)

10.72.110 - Severability.

Repealed.

(Ord. 3659 § 8, 1993)

(END OF ATTACHMENT A)